17596

Supreme — Mor Bradley Brief

The court construes the Statute & held the action barred by reason of not being brought within two years from the time the cause of action accrued. Correct.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~342~~ 134

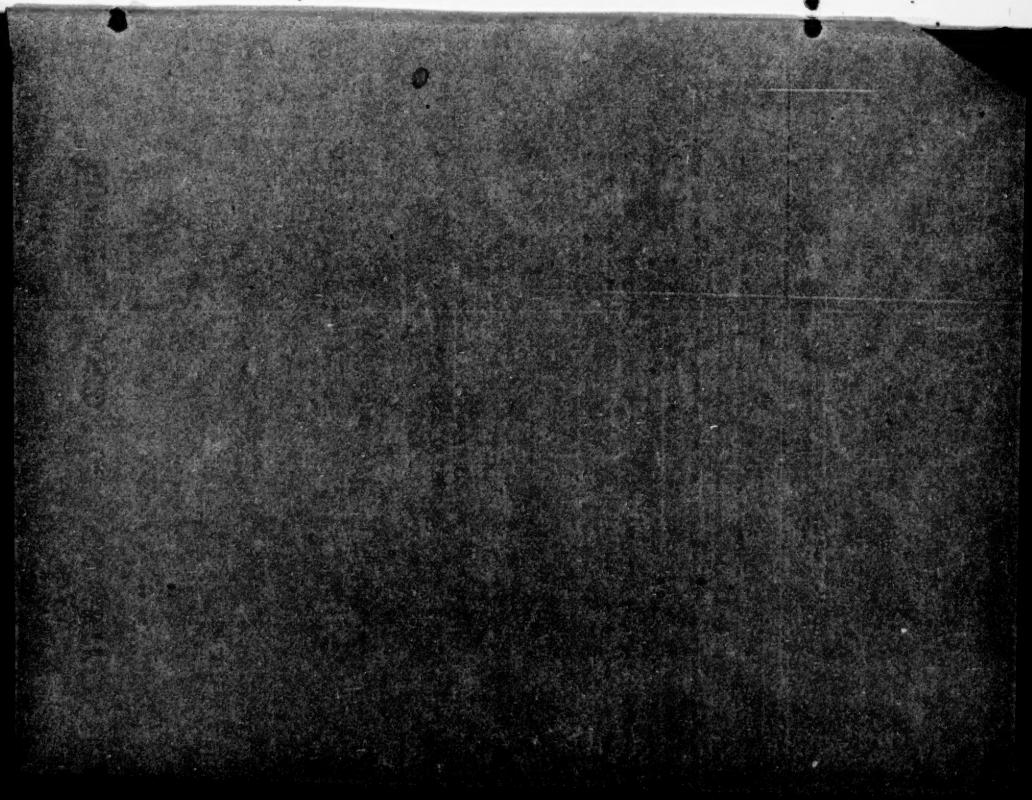
JOHN W. SOHN, PLAINTIFF IN ERROR,

vs.

THOMAS W. WATERSON, IMPLEADED WITH WILLIAM A. CALLENDAR AND GEORGE SEWARD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED FEBRUARY 1, 1872.



SUPREME COURT OF THE UNITED STATES.

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1 Pleas before the Hon. Jno. F. Dillon and Hon. Mark W. Delahay, judges of the circuit court of the United States for the district of Kansas, at a term of said court begun and held at the city of Topeka, in said district, on Monday, the 28th day of November, A. D. 1870.

JOHN W. SOHN, PLAINTIFF,
vs.
WILLIAM A. CALLANDER, THOMAS W. WATERSON, and George Seward, defendants. } No. 254.

Be it remembered that, on the 31st day of August, A. D. 1870, the said plaintiff, by N. C. McFarland, his attorney, filed in the clerk's office of said court his petition, precipe, and security for costs in the above-entitled cause; which said petition, precipe, and security for costs, together with endorsements thereon, are in words and figures following, to wit:

Circuit court of the United States in and for the district of Kansas.

JOHN W. SOHN, PLAINTIFF,
against
WILLIAM A. CALLANDER, THOMAS W. WATERSON, & George Seward, defendants.

2 The above-named plaintiff, John W. Sohn, says that he is a citizen of the United States of America, and a citizen and resident of the State of Ohio; that the defendant Thomas W. Waterson is a citizen and resident of the State of Kansas, and has been such citizen and resident ever since the year 1854; that, on the 17th day of October, 1854, and at the September term of the same year, by the consideration of the court of common pleas of the county of Butler, in the said State of Ohio, he recovered a judgment against the above-named defendants, William A. Callander, Thomas W. Waterson, and George Seward, for the sum of four thousand seven hundred and ninety-three dollars and forty-nine cents, and costs of suit, taxed at eight dollars and fifty-two cents; that no part of said judgment has ever been paid, and that there is now due the plaintiff from the defendants, on account thereof, the said sum of $4,793.49, and also said costs of $8.52, with interest at six per cent. per annum from the said 17th October, 1854:

Wherefore said John W. Sohn asks judgment against said William A. Callender, Thomas W. Waterson, and George Seward, for $4,802.01, with interest from October 17, 1854, and costs of suit,

3 By N. C. McFARLAND,
His Att'y.

JOHN W. SOHN, PLAINTIFF,
against
WILLIAM A. CALLENDER, THOMAS W. WATERSON, & George Seward, defendants.

Issue summons against the above-named defendants to the United States marshal for the district of Kansas, returnable according to law. Indorse amount of judgment claimed, $4,802.01, with interest from October 17, 1854, at six per cent. per annum.

N. C. McFARLAND,
Att'y for Plaintiff.

To the clerk of the circuit court of the United States for the district of Kansas:

AUGUST 2.

I acknowledge myself security for the plaintiff for costs in this case.
GEORGE DICK.

(Endorsed:) 254. John W. Sohn vs. William A. Callender,
4 Thomas W. Waterson, George Seward, Petition, filed Aug. 31, 1870. A. S. Thomas, clerk. McFarland.

And thereupon, on the 31st day of August, A. D. 1870, the clerk of said court issued a summons in the said-entitled case; which summons and endorsements thereon is in words and figures following, to wit:

Circuit court of the United States of America, district of Kansas, ss:

The United States of America to the marshal of the district of Kansas, greeting:

You are hereby commanded to notify William A. Callender, Thomas W. Waterson, and George Seward, that they have been sued by John W. Sohn in the circuit court of the United States for the district of Kansas, and that, unless they answer by the 30th day of September, A. D. 1870, the petition of the said John W. Sohn against them filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 10th day of September, A. D. 1870.

Witness the Hon. Salmon P. Chase, Chief Justice of the Su-
5 preme Court of the United States of America, at Topeka, in said district, this 31st day of August, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:) Action brought for the recovery of money. The plaintiff demands judgment for the sum of $4,802.01, with interest from the 17th day of October, A. D. 1854, at the rate of six per cent. per annum. N. C. McFarland, attorney for plaintiff. No. 254. Circuit court of the United States, district of Kansas. John W. Sohn, vs. William A. Callender, Thomas W. Waterson, George Seward. Summons issued Aug. 31st, 1870. Returnable Sept. 10, 1870. N. C. McFarland, attorney for plaintiff.

Afterward, to wit, on the 9th day of September, A. D. 1870, said summons was returned and filed in the office of the clerk of said court with the following return endorsed thereon, to wit:

I hereby deputize James Smith, of Marshal County, Kansas, to serve the within summons.

D. W. HOUSTON,
U. S. Marshal.

6 I do hereby certify that I served the within summons on the within named Thomas W. Waterson, by leaving a certified copy of the same with a competent person at his usual place of abode, on this 6th day of September, A. D. 1870.

W. D. HOUSTON,
U. S. Marshal.
By JAMES SMITH, *Deputy.*

(Endorsed:) Filed Sept. 9th, 1870. A. S. Thomas, clerk.

And on this day, to wit, Sept. 21st, 1870, came the said defendant, Thomas W. Waterson, by his attorney, and filed in the clerk's office of the circuit court of the United States for the district of Kansas, his answer in the said-entitled cause, which said answer is in the words and figures following, to wit:

Answer of Thomas W. Waterson.

Circuit court of the United States, in and for the district of Kansas.

JOHN W. SOHN, PL'FF,
vs.
WILLIAM A. CALLENDER, THOMAS W. WATERSON, & George Seward, def'ts.

1st. And the said Thomas W. Waterson, one of the defendants in the above suit, now comes and for himself alone, and for answer for himself to the petition of the above-named plaintiff, saith that the said plaintiff ought not to be permitted further to prosecute his said
7 action against him, because he saith that there is not any record of the said supposed judgment and recovery in the said petition mentioned remaining in the said court of common pleas, of the county of Butler, in said State of Ohio, as the said plaintiff in his said petition hath alleged, and this he prays may be enquired of by the court.

2nd. And for a further answer to the petition of the said plaintiff, the said Thomas W. Waterman, one of the above-named defendants, for himself saith that the said plaintiff ought not to have his said action thereof against this defendant; because he saith that the said cause of action in the said petition set forth did not accrue to the said plaintiff against this defendant within two years next before the commencement of this action, and this he is ready to make appear.

3d. And the said Thomas W. Waterson, one of the above-named defendants, for himself, further answering the petition of the said plaintiff, saith that the said plaintiff ought not to have his said action thereof against this defendant, because he saith that the said cause of action in the said plaintiff's petition set forth did not accrue to the said plaintiff against this defendant within three years next before the com-
8 mencement of this action, and this he is ready to make appear.

4th. And the said Thomas W. Waterson, one of the above-named defendants, for himself, further answering the petition of the said plaintiff, saith that the said plaintiff ought not to have his said action thereof against this defendant, because he saith that the said cause of action in the said plaintiff's petition set forth, did not accrue to the said plaintiff against this defendant within ten years next before the commencement of this action; and this he is ready to make appear.

SHANNON & BRUMBAUGH,
Att'ys for Waterson.

(Endorsed:) No. 254, John W. Sohn, vs. William A. Callender, Thomas W. Waterson, George Seward. Answer of Thomas W. Waterson. Filed Sept. 21, 1870. A. S. Thomas, clerk. Shannon & Brumbaugh.

And, on this day, to wit, Sept. 29, 1870, came the said plaintiff by his attorney and filed in the clerk's office of the circuit court of the

United States for the district of Kansas, his demurrer to the answer of the said defendant, Thomas W. Waterson, in the said-entitled
9 cause, which said demurrer is in the words and figures following, to wit:

Demurrer to answer.

Circuit court of the United States in and for the district of Kansas.

JOHN W. SOHN, PLAINTIFF,
against
WILLIAM A. CALLENDER, THOMAS W. WATERSON, & George Seward, defendants.

The plaintiff, John W. Sohn, demurs to the first, second, third, and fourth defences, as set forth and numbered in the answer of the defendant Thomas W. Waterson, for the reason that they do not, nor does any one of them, state facts sufficient to constitute a defence to the plaintiff's cause of action.

N. C. McFARLAND,
Att'y for Plaintiff.

(Endorsed:) No. 254. John W. Sohn vs. William A. Callender et al. Demurrer to answer. Filed Sept. 29, 1870. A. S. Thomas, clerk.

And afterwards, to wit, at a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 28th day of
10 November, A. D. 1870—present, the Hon. John F. Dillon and the Hon. Mark W. Delahay, judges of said court, at which term of said court on the 1st day of December, A. D. 1870, among other proceedings the following were had and appear of record in words and figures following, to wit:

THURSDAY, *Dec.* 1, 1870.

JOHN W. SOHN
vs.
WILLIAM A. CALLENDER, THOMAS W. WATERSON, and George Seward. 254.

This day came the plaintiff, and also the defendant Thomas W. Waterson, and this cause came on to be heard on the motion of the defendant Thomas W. Waterson to dismiss the petition, for the reason that the same did not state facts sufficient to give the court jurisdiction, and also the demurrer filed by the plaintiff to the several defences set forth in the defendant Thomas W. Waterson's answer; and thereupon the defendant Thomas W. Waterson asked leave of the court to withdraw his said motion to dismiss, which leave was granted by the court; and the plaintiff asked leave to withdraw his said demurrer so far as it related to the first defence set forth in said Waterson's answer, which was
11 likewise granted by the court; and thereupon the cause was argued to the court upon the demurrer of the plaintiff to the second, third, and fourth defences, set forth in said answer.

On consideration whereof the court does find that said demurrer is well taken as to the said third and fourth defences, and not well taken

as to the said second defence in said answer. And the court does find that the said demurrer ought to be sustained as to said third and fourth defences in said answer, and overruled as to the said second defence.

It is therefore ordered by the court that said demurrer be sustained as to said third and fourth defences, and overruled as to the said second defence.

To which finding and decision of the court overruling said demurrer to said second defence in said answer, the plaintiff, now here in open court, excepts, and asks to have his exceptions here entered, which the court allows; and the said plaintiff not desiring to further plead, the court does find that the said defendant Thomas W. Waterson should have judgment.

It is therefore considered by the court that defendant Thomas W. Waterson go hence without day, and recover of the plaintiff his
12 costs herein, taxed at .

To which judgment of the court the plaintiff now here in open court also excepts, and by leave of the court enters here his said exceptions.

13 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, do hereby certify the foregoing transcript to be a true, full, and perfect copy from the record of all the proceedings had in said court, in the case of John W. Sohn, plaintiff, vs. William A. Callender, Thomas W. Waterson, and George Seward, defendants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Topeka, in said district, this 6th day of October, A. D. 1871.

[SEAL.] A. S. THOMAS, *Clerk.*

14 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable judge of the circuit court of the United States for the district of the State of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the circuit court before you, between John W. Sohn, plaintiff, and Thomas W. Waterson, impleaded with William A. Callendar and George Seward, defendant, a manifest error hath happened to the great damage of the said John W. Sohn, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, destinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
15 Court of the United States, together with this writ, so that you have the same at Washington on the first day of the next term thereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 31st day of December, in the year of

our Lord one thousand eight hundred and seventy, and of our Independence the ninety-fifth year.

[SEAL.]

A. S. THOMAS,
Clerk of the Circuit Court of the United States,
Dist. of Kansas.

Allowed by

JNO. F. DILLON,
Circuit Judge, 8th Circuit.

(Indorsed:) No. 254. John W. Sohn, vs. Thomas W. Waterson. Writ of error. Filed Dec. 31, 1870. A. S. Thomas, clerk.

16 UNITED States OF AMERICA, *ss:*

To Thomas W. Waterson, impleaded with William A. Callender and George Seward, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December, 1871, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eighth circuit, and the district of the State of Kansas, wherein John W. Sohn is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge of the circuit court of the United States for eighth circuit, and for the district of the State of Kansas, this 31st day of December, A. D. 1870.

JOHN. F. DILLON,
Circuit Judge.

LAWRENCE, STATE OF KANSAS, *Sept.* 18*th*, 1871.

I acknowledge service of the within writ this day, by handing me a copy thereof.

WILSON SHANNON,
Att'n'y for Thomas W. Waterson, Def't.

(Indorsed:) No. 254. John W. Sohn vs. Thomas W. Waterson & others. Notice. Filed Dec. 31, 1870. A. S. Thomas, clerk.

17 And now comes the said John W. Sohn and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The said circuit court of the United States in and for the district of Kansas held that the demurrer of the plaintiff to the second defence set forth in the defendant's answer was not well taken.

2. The said circuit court overruled the demurrer of the plaintiff to the second defence set forth in the defendant's answer.

3. The said circuit court gave judgment on the demurrer of the plaintiff to the second defence in defendant's answer for the said Thomas W. Waterson, whereas by the laws of the land it ought to have been

18 given for the said John W. Sohn; wherefore he prays that said judgment against him on said demurrer may be reversed, and that he may be restored to all things lost thereby.

By JAMES M. SPOONER, &
N. C. McFARLAND,
His Attorneys.

Know all men by these presents that we, Noah C. McFarland and George Dick, of the city of Topeka, in the county of Shawnee, State of Kansas, are held and firmly bound unto D. W. Middleton, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said D. W. Middleton, his heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this 31st day of December, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately at Topeka, in said State of Kansas, in a suit depending in the circuit court of the United States between John W. Sohn, plaintiff, and Thomas W. Waterson, impleaded with William A. Callender and George Seward, defendant, judgment was rendered against the said John W. Sohn, and the said John W. Sohn having obtained leave to remove the said cause to the Supreme Court of the United States and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the judgment in the aforesaid suit:

Now the condition of the above obligation is such, that if the said obligors shall well and truly pay, or cause to be paid, to the said D. W. Middleton, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said D. W. Middleton, clerk, as aforesaid, and charge to the said John W. Sohn, in the prosecution of the said suit in the said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

Signed and delivered in presence of—

NOAH C. McFARLAND. [L. S.]
GEORGE DICK. [L. S.]

Approved.

A. S. THOMAS,
Clerk of the Circuit Court of the United [States,] for the District of Kansas.
JNO. F. DILLON, *Judge.*

(Indorsed:) 254. John W. Sohn vs. Thomas W. Waterson. Bond. Filed Dec. 31, 1870. A. S. Thomas, clerk.

(Indorsement on cover:) No. 342. John W. Sohn, plaintiff in error vs. Thomas W. Waterson, impleaded with William A. Callendar and George Seward. Kansas, C. C. U. S. Filed 1st February, 1872.

Supreme Court of the United States.

JOHN W. SOHN,

Plaintiff in Error,

vs.

THOS. W. WATERSON,

Impleaded with

WILLIAM A. CALLENDER and GEORGE SEWARD,

On Error to the Circuit Court of the United States for the District of Kansas.

Brief for Plaintiff in Error.

JAMES M. SPENCER,
N. C. McFARLAND,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

JOHN W SOHN, Plaintiff in Error,

vs.

THOS. W. WATERSON, impleaded with WILLIAM A. CALLENDER and GEORGE SEWARD.

On Error to the Circuit Court of the United States for the District of Kansas.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

The original petition filed by the plaintiff in error, in the Court below, among other things sets forth that the defendant, Thomas W. Waterson, is a citizen and resident of the State of Kansas, and has been such citizen and resident ever since the year 1854; that at the September term of the year 1854, by the consideration of the Court of Common Pleas, of the County of Butler, State of Ohio, the said plaintiff recovered a judgment against the said William A. Callender, Thomas W. Waterson and George Seward for $4,793 49, and costs of suit; and that there is due the Plaintiff, from the Defendants on account thereof, the said sum of money with interest.

To this petition the defendant, Thomas W. Waterson, who alone was served with process, filed an answer, setting forth several defences.

Plaintiff demurred to the second, third and fourth defences in said answer, because they did not, nor does any one of them state facts sufficient to constitute a cause of action.

On the hearing, the Court sustained the demurrer as to the third and fourth defences, and overruled it as to the second. To which overruling of the demurrer, the plaintiff excepted, and entered his exception on the record.

The said second defence avers that the plaintiff ought not to have his action against the defendant, "because he saith that the said cause of action in the said petition set forth did not accrue to the said plaintiff against this defendant, within two years next before the commencement of this action."

And so the single question now presented to this Court is, whether the answer of the two year statute of limitations is a good defence to the action.

ERROR RELIED ON.

The error now relied on to reverse the judgment of the Court below is, that said Court overruled the demurrer to said second defence, and held that the action was barred by reason of not being brought within two years from the time the cause of action accrued.

ARGUMENT.

The law relied on by counsel for Waterson, is as follows:

"Section 2. All actions founded on any promissory note, bill of exchange, writing obligatory, bond, contract, judgment, decree or other legal liability, made, exe-

cuted, rendered, entered into, or incurred beyond the limits of this Territory, shall be commenced within two years next after the cause or right of such action shall have accrued, and not after."

Compiled Laws of Kansas, 1862, p. 232.

This section is an amendment to the law published in the same vol., p. 127, and is the only provision in the aw which provides for limiting actions on judgments. Therefore section 25, p. 128, same vol., which provides for actions, "not herein before provided for," does not apply. The amendment passed at the same session will be construed with the original law. What then as to the section limiting actions on judgments of other States to two years? We claim it to be wholly inoperative and void as to this case:

Because the two years had more than expired from the accruing of the action to the passage of the act, the law therefore did not *limit*—it *extinguished* the remedy. Note carefully the words, "within two years next *after the cause or right of such action shall have accrued.*" When then did the cause of action accrue in Kansas? We say whenever two facts appear—the residence of Waterson in Kansas, and the existence of the judgment in Ohio.

The petition states that Waterson has been a resident of Kansas since the year 1854, and that the judgment was rendered in Ohio, October 17, 1854. So that *the right of action must have accrued* more than four years before the passage of the law. That the law in such case is inoperative and void, is well settled in many cases.

The Society, &c., vs. Wheeler, et. al., 2 Gall., 104–141.

Blackford, et. al., vs. Jonson's ex., 1 Black., 35–6, and note.

Call, vs. Hagger, et. al., 8 Mass., 423–429.

Parker, vs. Kane, et. al., 4 Wis., 1-17-18.

Piatt, vs. Vatteir, et. al., 1 McLean, 146-158.

Lewis, vs. Broadwell's admr., 3 McLean, 568-9.

Price, vs. Hopkins and another, 13 Mich., 318-322.

Auld & Auld, vs. Butcher & Butcher, 2 Kan., 135-155.

But the learned Circuit Judge who decided this case in the Court below, admitting the correctness of these decisions, sought to avoid their applicability by giving what seems to us a singular construction of the statute. He said:

"As the defendant was a resident of this State when the act of February 10th, 1859, took effect, it is our opinion that the two years limitation therein provided, began to run in favor of the defendant as against the present cause of action, from that period, and that this action might have been brought at any time within two years after that act went into operation. Not having been brought within that period it was barred."

1st Dillon, p. 360.

But the defendant was a resident from and after 1854. And right here is the very point which settles the question. Did this statute give the plaintiff a right of action for two years "after that act went into operation." Or did it give him two years from the time the cause of action accrued? We do not deny the correctness of the provision of the general statutes of 1868, p. 635, sec. 25, that "when a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of de-

fence," but we say, that before the decision of the learned Judge below can be strengthened by it, it must first be conceded that the action was barred by the statute of 1859. Our position is, that that statute was inoperative to bar our action, and that therefore, sec. 25 does not apply. The learned Judge in the Court below admits (1 Dillon, p. 361,) that he gives this statute "a prospective operation, notwithstanding its language," from a supposed intent of the Legislature. We do not believe that a supposed "legislative intention" is sufficient to overthrow the plainest and most unequivocal language; and we do not think this Court will give a construction against the clear provisions of this statute, in order to make it effective to bar actions on judgments in *two years!* The law itself is unreasonable and without a parallel, and ought not to be applied except when required by its terms. There is nothing on the face of it that shows it was ever intended to be retrospective in its application.

JAMES M. SPENCER,
N. C. McFARLAND,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

JOHN W. SOHN, Plaintiff in Error,

vs.

THOMAS W. WATERSON IMPLEADED WITH WILLIAM A. CALLENDER AND GEORGE SEWARD, Defendants in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

I. A statute that attempts to bar summarily an existing right of action, is within the constitutional inhibition, that "no State shall pass a law impairing the obligations of contracts." A reasonable opportunity must be afforded to parties to try all rights of action existing when such a law passed.

Cooley's Constitutional Limitations, 2d Edition, p. 366, and a large number of authorities there cited.

Berry *vs.* Ramsdell, 4 Mett. Ky., 296.

Auld *vs.* Butcher, 2 Kansas, 135.

15 Howard, 421.

Webster *vs.* Cooper, 14 Howard, 488.

Johnson *vs.* Band, Hempstead, 533.

Call *vs.* Hagger, 8 Mass., 429.

Oatman *vs.* Band, 15 Wis., 28.

II. The Legislature meant what they have actually expressed. The precise words construed in their ordinary sense leave no doubt as to what was intended. There is not

an ambiguous word or phrase in the act in question, and hence nothing left for construction or implication.

Story's Conflict of Law, Introductory Remarks, p. 10.

Potter's Dwarris on Statutes and Constitutions, p. 208.

Jackson *vs.* Lewis, 17th Johnson, p. 475.

People *vs.* N. Y. Cent. R. R. Co., 13 N. Y., p. 78.

Wood *vs.* Adams, 35 New Hampshire, p. 36.

Scott *vs.* Reid, 10 Peters, p. 524.

JOHN B. SANBORN,
For Plaintiff in Error.

134

Supreme Court of the U. S.

DECEMBER TERM, 1873.

JOHN W. SOHN,
Plaintiff in error.
vs.
THOMAS W. WATERSON *et al.*
Defendants in error.
No. 134.

Error to the Circuit Court of the United States, for the District of Kansas.

Brief of THOMAS EWING, *for Defendant in Error.*

Plaintiff obtained judgment against defendants, in Ohio, October 17th, 1854, for $4,793.49, and costs. Defendant, Waterson, removed to Kansas that year, and resided there until November 28th, 1870, when he was sued on the judgment in the Circuit Court of the United States, for that District. He pleaded in bar:

1st. The Kansas statute of February 10th, 1859, which provides:

"Sec. 2. All actions founded on any * * * judgment rendered * * beyond the limits of this territory, shall be commenced within two years next after the cause or right of such action shall have accrued." (Compiled Laws of Kansas, 1862, p. 232.)

To this plea, Plaintiff demurred. The demurrer was overruled, and judgment rendered for defendant. (See the case reported in 1st Dillon, p. 360.)

It is settled by decisions of the Supreme Court of the Territory and of the State of Kansas, that this statute is applicable, to all causes of action enumerated in it, existing, and not barred, at its passage. The general statutes of limitation enacted in the code of February 12th, 1858, (Laws of 1857-8, p. 66,) and those enacted in the code of February 11th, 1859, (compiled laws of Kansas, 1862, p. 126,) provide that civil actions "can only be commenced within the periods prescribed in this title *after the cause of action shall have accrued.*" These laws, and that of Febrnary 10th, 1859, are all *in pari materia*, and the same provision must be construed alike in each. It was decided by the Supreme Court of the Territory, in Morton v. Sharkey, (1st McCahon, 117,) and by the Supreme Court of the State, in Elliot v. Lochnane, (1st Kansas, 134,) that the expression, "*after the cause of action shall have accrued,*" was not intended to restrict the limitations of the code of 1858 to causes of action thereafter to arise. The correctness of these decisions is nowhere questioned in any Kansas case. As the settled constructions by the State courts of the local laws are accepted by the courts of the United States as rules of decision, it is thus established that the act of February 10th, 1859, applies, in some way, to causes of action existing and not barred at its passage.

How then is the statute to be applied to such causes? Obviously, as Judge Dillon applied it. It being settled, that the statute was intended to operate on causes of action then existing, the grammatical construction itself supports Judge Dillon's interpretation. The use of the future perfect tense, indicates that the statute is

to run in all cases two years from the date when the cause of action "*shall have*" come under its operation.

If this statute was intended to instantly bar causes arising in other States and then more than two years old, the limitations of the codes of February 12 1858, and February 11, 1859, in like manner, instantly barred causes of *domestic* origin. The codes of 1858 and 1859 greatly shortened the limitations prescribed in the laws of 1855. (Kansas Sts., 1855, p. 95-6.) Thus the period of limitation of actions for trespass on real property, and for taking, detaining, or injuring personal property, was three years by the law of 1855, and two years by the laws of 1858,–'9; and for actions on sealed instruments twenty years by the earlier, and three years by the later, laws. So that, when the code of 1858 was enacted, there were numerous rights of action in Kansas not barred by the earlier and longer statute, which would have been instantly barred by that code, if the period must run from the origin of the cause of action. It could not have been intended by the legislators to thus peremptorily cut off, without notice, numerous and valuable rights of action of their own constituents. The legislative purpose is the pole star of courts when construing statutes; and therefore such construction cannot be given that act—or the act of February 10, 1859, which, being in the same language and on the same general subject, must have a like construction.

The interpretation given by the Supreme Court of Kansas Territory to the limitations of the code of 1858, (Morton v. Sharkey, 1st McCahon, 117) is, *mutatis mutandis*, the interpretation given by Judge Dillon to the act of Feb. 10, 1859. So, a like statute in Texas was held applicable to existing causes of action, but not as an instant bar.

Gautier *vs.* Franklin, 1st Texas, 744.

But, if the law of February 10, 1859, be construed as *intended* to instantly bar this action, it must be given that effect. This is not a suit on a contract. Even though this court should look behind the judgment to its origin, the record does not show that it originated *ex-contractu*. Therefore the instant bar cannot be held to have impaired the obligations of a contract. It certainly falls under no other prohibition of the Federal Constitution, and under none of the Constitution of Kansas. The general grant of power to the legislature in the Constitution of Kansas, (Compiled laws 1862, p. 54,) includes all the legislative power which society can confer on government. It is as broad, except as specially limited by the Constitution of the United States and of Kansas, as the *legislative* power of Parliament. The courts of England give effect to laws destroying vested rights, where no interpretation consistent with justice is possible. Hence, as this is a legislative act, and not within any special prohibition, it cannot be declared unconstitutional, though it impair a vested right.

Brown's Law of Lim., p. 684, and cases cited.

Cooley's Const. Lim., p. 167-8-9.

2d. The other plea in bar relied on, is, the limitation provided in Sec. 25 of the code of Feb. 11, 1859. (Compiled Laws 1862, p. 128.)

"Sec. 25. An action for relief, not hereinbefore provided for, can only be brought within *ten* years after the cause of action shall have accrued."

If the plea of the two years statute above considered be bad, it is either because that law was not intended to

relate to causes of action then existing; or because, if so intended, it was unconstitutional, because operating as an instant bar. If for either reason that statute did not bar this action, the plea of the *three* years limitation in Sec. 29 of the code of Feb. 11, 1859, (Compiled Laws of Kansas, 1862, p. 127) is also bad. Hence, this action is one "*for relief not herein before provided for*" and is within the operation of Sec. 25, above quoted. As the ten years limitation had but half run out (counting from the date this judgment was rendered in Ohio) when section 25 was enacted, any construction which would make the two or three years statutes inapplicable to this cause of action would make the ten years statute an effectual bar.

THOMAS EWING,

for Defendant in Error.